Dissenting Views, H.R. 1036, the "Protection of Lawful Commerce in Arms Act"

The undersigned oppose H.R. 1036, the "Protection of Lawful Commerce in Arms Act," and strenuously object to the process by which it was adopted by the Committee. The maneuvers employed by the **M**ajority to quell dissent of its special interest legislation are all too transparent and occurring with alarming frequency in this Committee. The partisan manner in which this bill was rushed through the Committee constitutes a major disservice to the American public who expect their representatives to engage in a deliberative effort when constructing legislation of such magnitude.

H.R. 1036 was noticed for a legislative hearing in the Subcommittee on Commercial and Administrative law. The hearing was held on April 2, 2003, one day prior to the markup in the Full Committee. The Subcommittee process did not lend itself to a thorough consideration of the bill given that two of the three witnesses invited by the Majority submitted their testimony late. The testimony of one witness was submitted under an hour before the hearing began. Notwithstanding the tardiness of the testimony, the interest of the Minority in fully exploring the ramifications of the bill was eminently evident at the Subcommittee hearing. Both the Ranking Member of the Full Committee, Mr. Conyers, and the Ranking Member of the Subcommittee on Crime, Mr. Scott, attended and actively participated in the Subcommittee hearing. Moreover, at the request of the Minority, members were granted unanimous consent to propound additional questions in writing to the panel of witnesses–the answers to which will have no bearing on Members's evaluation of the bill which is already scheduled for consideration on the Floor.

The Full Committee markup provided even less process for Members of the Minority to exercise their right as representatives to participate in the drafting of comprehensive legislation that may affect the vested interests of many of their constituents. After one Democratic amendment had been offered and withdrawn, and during the pendency of only the second Democratic amendment offered by Mr. Watt, the Ranking Member of the Subcommittee from which the bill originated, the Majority cut off debate by moving the previous question on the amendment, the amendment in the nature of a substitute, and the bill. Mr. Watt's amendment was based upon the testimony received before the Subcommittee which suggested a lack of nexus between the design and manufacturing of a gun that was criminally used to injure or kill another. The amendment would have immunized manufacturers from such liability, while permitting negligence actions against sellers, dealers, and distributors to proceed.

Despite the substance of the amendment, the Majority – apparently angered by Mr. Watt's insistence, as was his right, that the amendment (which was a little over one page) be read[1] – moved the previous question. The bill was then reported, without any objection from the

[1]Mr. Watt explained: "I would just say to the members of the committee, I had this read in an effort to return us to a serious deliberation about this bill, and . . . in an effort to make sure that you all read what I had written and what was being proposed. . . ." Transcript, Markup of H.R. 1036, the "Protection of Lawful Commerce in Arms Act," Thurs., Apr. 3, 2003 (House of Representatives Committee on the Judiciary), at p. 21.

Majority, even though approximately one dozen substantive Democratic amendments were awaiting consideration.[2] The dispatch with which the Majority scheduled this bill for a hearing, markup, and Floor consideration lends credence to the conjecture that passage of H.R. 1036 is less about remedying a perceived boom of frivolous lawsuits as it is delivering a pro-gun bill in advance of the NRA's late April annual convention. We object to the "process" and delineate our substantive concerns below.

I. Background and Summary

H.R. 1036, the "Protection of Lawful Commerce in Arms Act" prohibits civil liability actions from being brought or continued (the bill applies to pending cases) against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the "criminal or unlawful misuse" of their products by the injured party or others. The bill, which was introduced on February 27, 2003, and referred to the Judiciary Committee is similar to two bills introduced during the 107th Congress. H.R. 123, the "Firearms Heritage Protection Act of 2001"was introduced by Rep. Bob Barr in January 2001 with 62 co-sponsors and referred to the Judiciary Committee. No action was taken on the bill. H.R. 2037, the "Protection of Lawful Commerce in Arms Act" was introduced by Rep. Cliff Stearns in May 2001 and referred to the House Energy and Commerce and Judiciary Committees. H.R. 2037 was marked up in both House Committees, reported out and placed on the Union Calendar in early October 2002.

Days after H.R. 2037 was placed on the House calendar, the Washington, DC area was besieged by a sniper(s) who indiscriminately gunned down innocent victims with a high caliber rifle. In the aftermath of the sniper shooting, no further action was taken on the bill last term. H.R. 1036, like its predecessor, however, would eviscerate actions by survivors of victims of the Beltway sniper now pending against segments of the gun industry for negligent distribution of the Bushmaster rifle used in the killings.

Over the past few years, more than thirty-four governmental entities have filed suit against gun manufacturers, distributors and trade associations in an attempt to bring to an end marketing and distribution schemes that place guns in the hands of criminals. Relying on public nuisance theories and claims of product liability violations, these various municipalities targeted the gun industry for displaying an utter indifference to the safety of their communities and cities through their faulty design and selling of guns. During the last term of Congress, of the thirty-four suits, eighteen had won favorable rulings on the legal merits of their claims; five were battling motions to dismiss; four had their claims dismissed; and seven ended without success.

H.R. 1036, as was its predecessors, was introduced presumably in response to these lawsuits. The bill prohibits civil actions from being brought against manufacturers or distributors of firearms or ammunition products, or trade associations of such manufacturers or distributors,

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[2]In addition to several other amendments by Mr. Watt, at least four other Democrats, including Mr. Conyers, Mr. Scott, Ms. Lofgen, Ms. Jackson-Lee, had amendments at the desk waiting to be offered.

for damages resulting from the criminal or unlawful misuse of a firearm by the injured person or by a third party. The bill further requires the dismissal of any action encompassed by the bill pending on the date of the bill's enactment. Under the specific terms of the bill, only **five** specified causes of action would be permissible against protected members of the gun industry. They are (1) transfers where the transferor has been convicted of violating Section 924(h) of title 18; (2) actions alleging negligent entrustment (as defined in the bill) or negligence per se; (3) actions alleging knowing and willful violation of a federal or state law relating to the sale or marketing of the product, where the violation was the proximate cause of the harm; (4) breach of contract or warranty claims; and (5) actions for physical injury or property damage directly due to the design or manufacturer of the product, when used as intended.[3]

II. Section-by-Section Analysis

Sec. 1. Short title. "Protection of Lawful Commerce in Arms Act".

Sec. 2(a). Findings. Sets forth legislative findings in support of this title. The key findings are as follows:

(1) Citizens have a right, under the Second Amendment to the U.S. Constitution, to keep and bear arms.

(2) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended seeking money damages and other relief for the harm caused by the misuse of firearms by third parties.

(3) The manufacture, importation, possession, sale, and use of firearms and ammunition in the U.S. is heavily regulated by Federal, State and local laws.

(4) Businesses engaged in the lawful design, marketing, distribution, manufacture, importation, or sale to the public of firearms or ammunition that have been shipped or transported in interstate or foreign commerce are not, and should not be, liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(5) The possibility of imposing liability on an entire industry for harm that is the sole responsibility of others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in America's free enterprise system, and constitutes an unreasonable burden on interstate and foreign commerce.

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[3]H.R. 1036, Sec. 4.DEFINITIONS, (5) QUALIFIED CIVIL LIABILITY ACTION.– (A)(i)–(v), at pp. 7-8 (emphasis added).

(6) The liability actions commenced or contemplated by governmental entities and private interest groups are based on theories without foundation in hundreds of years of the common law and American jurisprudence. The possibility that a "maverick" judge or jury would sustain these actions would constitute an expansion of civil liability in a manner never contemplated by the Framers of the Constitution. Finally, such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the U.S. Constitution.

(b) Purposes. Outlines the purposes of the Act which include: (1) prohibiting causes of actions against manufacturers, distributors, dealers, and importers of firearms or ammunition products for harm caused by third parties when the product functioned as designed and intended; (2) preserving citizen access to firearms and ammunition for lawful purposes; (3) guaranteeing a citizen's rights, privileges, and immunities under the Fourteenth Amendment to the U.S. Constitution; (4) preventing the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce; and (5) protecting the First Amendment rights of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations to speak freely, assemble peaceably, and petition the Government for redress of their grievances.

Sec. 3. Prohibition on Bringing of Qualified Civil Liability Actions in Federal or State Court.

(a). In General. This provision prohibits any person from bringing a "qualified civil liability action" in any Federal or State court.

(b). Dismissal of Pending Actions. This provision requires courts to dismiss any "qualified civil liability" action wherever pending on the date of enactment of this Act.

Sec. 4. Definitions.

(1) Engaged in the Business. Defines the term "engaged in the business" as that provided in section 921(a)(21) of title 18, U.S.C., and as applied to a seller of ammunition, means a person who "devotes, time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principled objective of livelihood through the sale or distribution of ammunition."[4]

[4]18 U.S.C. § 921(a)(21)(A)–(F)defines the term "engaged in the business" as it relates to (a) a manufacturer of firearms; (b) a manufacturer of ammunition; (c)a dealer in firearms as defined in 921(a)(11)(A), i.e., "any person engaged in the business of selling firearms at wholesale or retail"; (d) a dealer in firearms as defined in 921(a)(11)(B), i.e., "any person engaged in the business of repairing firearms or the making or fitting special barrels, stocks, or trigger mechanisms to firearms"; (e) an importer of firearms; and (f) an importer of ammunition in identical terms as that provided in H.R. 1036 as it relates to a seller of ammunition. 921(a)(21) does not include in its definition of "engaged in the business," a dealer in firearms as defined in 921(a)(11)(C), who is a pawnbroker.

(2) Manufacturer. Defines "manufacturer"as (a) a person engaged in a business of manufacturing the product in interstate or foreign commerce and (b) who is licensed to engage in such business under chapter 44 of title 18, U.S.C.

(3). Person. Defines the term "person" as any individual, corporation, company association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4). Qualified Product. Defines a "qualified product" as a firearm (defined in Section 921(a)(3) of title 18) including any antique firearm (defined in Section 921(a)(16) of title 18), or ammunition (defined in section 921(a)(17) of title 18), or a component of either that has been shipped in interstate or foreign commerce.

(5). Qualified Civil Liability Action. *(A) IN GENERAL*: Defines a "qualified civil liability action" as an action brought by any person against a manufacturer or seller of a qualified product, or trade association, for damages resulting from the "criminal or unlawful misuse of a qualified product by the person or a third party." Excluded from the definition are (1) transfers where the transferor has been convicted of violating Section 924(h) of title 18; (2) actions alleging negligent entrustment or negligence per se; (3) actions alleging knowing and wilful violation of a federal or state law relating to the sale or marketing of the product, where the violation was the proximate cause of the harm; (4) breach of contract or warranty claims; and (5) actions for physical injury or property damage directly due to the design or manufacture of the product when used as intended. *(B) NEGLIGENT ENTRUSTMENT:* Defines the term "negligent entrustment" as the provision of a qualified product by a seller to another person when the seller knows or should have know that the person to whom the product was provided is likely to, and in fact does, use the product in a manner involving unreasonable risk of physical harm to others.

(6). Seller. Defines a "seller" of a qualified product as (a) an importer (as defined in 921(a)(9), title 18 U.S.C.) licensed pursuant to chapter 44 of title 18 to engage, and is so engaged, in the business of an importer in interstate or foreign commerce; (b) a dealer (as defined in 921(a)(11), title 18 U.S.C. [5]), licensed under chapter 44 of title 18 to engage, and is so engaged, in business as a dealer in interstate or foreign commerce; and (c) a person engaged in the business of lawfully selling ammunition (as "ammunition" is defined in 921(a)(17), title 18, U.S.C.[6]) in interstate or foreign commerce at the wholesale or retail level.

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[5]Under this section, a seller would include a pawnbroker as defined in 921(a)(11)(C), title 18, U.S.C.

[6]Ammunition covered by this bill as defined by 18 U.S.C. §921(a)(17) includes "ammunition or cartridge cases, primers, bullets, or propellent powder designed for use in any firearm" and "armor piercing ammunition." Armor piercing ammunition, as defined in section 921, includes projectiles, projectile cores or full jacketed projectiles larger than .22 caliber which may be used or which are designed and intended to be used in a handgun. Section 921 further provides, however, that

'armor piercing ammunition' does *not* include shotgun shot required by Federal or State

(7). State. Defines a "state" as any of the several states of the U.S., the District of Columbia, any U.S. territory, or other possession of the U.S. and any political subdivisions thereof.

(8). Trade Association. Defines a "trade association" as any association or organization, whether incorporated or not, that is not operated for profit and whose members consist of two or more manufacturers or sellers of a qualified product.

III. Policy Concerns

A. The bill immunizes gun manufacturers and sellers from liability under most negligence and common law principles.

Under current law, a gun dealer may be liable for shootings using guns negligently sold to a trafficker, for example, where the dealer sold 50 or 100 guns to a person who clearly intended to resell them to criminals.[7] Under H.R. 1036, these dealers would be immunized from liability, despite their negligent conduct. Victims of gun industry misconduct would also be denied a remedy under public nuisance law. Only in the narrow class of cases enumerated in Section 4 of the bill (e.g., when a dealer knowingly transferred a gun to someone despite knowing it would be used to commit a crime of violence or a drug trafficking crime, or when the dealer negligently entrusted the gun to a shooter, or a plaintiff files a negligence per se case) would plaintiffs be permitted to seek relief for their foreseeable injuries. H.R. 1036 would even immunize from liability gun dealers found guilty of violating most federal gun laws (except 18 U.S.C. 924(h)), unless such violation was knowing and wilful and was the proximate cause of the harm for which relief is sought.

B. The bill discourages gun manufacturers from adopting product safety enhancements.

Under existing product liability law in most states, manufacturers must include feasible safety devices that would prevent injuries caused when their products are foreseeably misused, regardless of whether the victim's injury also was caused by the unlawful conduct of the victim or

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> environmental or game regulations for hunting purposes, a frangible projectile designed for target shooting, a projectile which the Secretary finds is primarily intended to be used for sporting purposes, or any other projectile or projectile core which the Secretary finds is intended to be used for industrial purposes, including a charge used in an oil and gas well perforating device.

18 U.S.C. §921(a)(17)(C) (emphasis added).

[7] Former police officer, David Lemongello, who testified at the subcommittee hearing upon the recommendation of the Ranking Member, Melvin Watt, is presently engaged in litigation alleging such a "sham purchase." Officer Lemongello and his partner were severely injured in a shootout by a gun that had been purchased by a criminal in a bulk, cash sale of 12 firearms.

a third party. H.R. 1036 discourages gun manufacturers from adopting reasonable design safety enhancements such as "gun locks" or safety triggers by substantially limiting the type and scope of permissible product liability actions. Under this bill, gun manufacturers face no liability for failing to implement safety devices that would prevent foreseeable injuries, provided the individual who possessed the gun was a child or some other person not permitted to possess a gun. This "unlawful use" under the bill would insulate the manufacturer from avoidable accidental injury.

C. The bill undermines the Supreme Court's longstanding interpretation of the Second Amendment to the U.S. Constitution.

As part of the bill's findings, Section 2 of the bill declares that "[c]itizens have a right, protected by the Second Amendment to the United States Constitution, to keep and bear arms". This blanket statement is made absent any qualification and ultimately undermines the plain language wording of the Second Amendment which describes the right in relation to "a well regulated militia, being necessary to security of a free state."[8] Regrettably, it also disregards over sixty years of U.S. Supreme Court precedent that has interpreted the right to bear arms to exist based upon "some reasonable relationship to the preservation or efficiency of a well regulated militia."[9]

D. The Narrow Exceptions in H.R. 1036 Will Not Protect Most Victims of Gun Industry Negligence.

H.R. 1036 would deprive gun violence victims of their legal rights in cases involving a wide range of industry misconduct. The bill generally prohibits any action "brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." This radically rewrites well-accepted principles of liability law, which generally hold that persons and companies may be liable for the foreseeable consequences of their wrongful acts, including the foreseeable criminal conduct of others.

The New Mexico Court of Appeals recently wrote in a case involving an accidental shooting by a teenager that "[s]uppliers are responsible for risks arising from foreseeable uses of the product, including *reasonably foreseeable unintended uses and misuses.*" In the last two

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[8] U.S. Const. Amend II.

[9] U.S. v. Miller, 307 U.S. 174, 178 (1939). Mr. Scott, Ranking Member of the Subcommittee on Crime, was deprived of an opportunity to offer an amendment which would have addressed the fallacy of this finding. Indeed, in *Miller,* the Supreme Court declared that the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms. More specifically, the Court stated that the "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness" of the state militia and that the amendment "must be interpreted and applied with that end in view." Thus, the Second Amendment does not protect individual ownership of guns and does not constitute a barrier to Congressional regulation of firearms.

years alone, the Supreme Court of Ohio[10], and appeals courts in New Mexico[11], Illinois[12] and New Jersey[13], have held that a gun manufacturer or seller can be liable for the criminal use of guns, if that use is a foreseeable result of the manufacturer's or seller's negligence or other wrongful conduct. Because most cases brought by gun violence victims involve "criminal or otherwise unlawful misuse" of a gun that was caused or facilitated by a gun manufacturer or seller, the bill amounts to an unprecedented attack on the legal rights of such victims.[14]

Also, a gun seller may supply criminals with the means to kill by irresponsibly selling 10, 25, or 100 guns to a gun trafficker, as was the case with the injury suffered by the Minority witness at the Subcommittee hearing, former Officer Lemongello. Under generally accepted legal principles, such a sale could be negligent since the foreseeable result is that the trafficker will sell one of the guns to a criminal who will use that gun in crime. In Officer Lemongello's case, a West Virginia Circuit Court judge recently held that the gun dealer, who sold 12 guns in a cash sale, under suspicious circumstances, could be liable under that state's law of negligence and public nuisance for failing to use reasonable care in its sale, and that a jury could find that the subsequent criminal shooting was a foreseeable result of the negligent sale.[15] However, under this bill, dealers would be immune from liability if the guns are used in crime. Nor will the specific narrow exceptions in the legislation protect the rights of most of the victims who have been harmed by irresponsible gun manufacturers and sellers.

1. TRANSFEROR CONVICTED UNDER 924(h) of Title 18, U.S.C

The first exception in H.R. 1036 is for "an action brought against a transferor convicted under section 924(h) of title 18, United States Code, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted."

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[10]*Cincinnati v. Beretta, et. al.,* 768 N.E.2d 1136 (Oh. 2002).

[11]*Smith v. Bryco,* 33 P.3d 638 (N.M. App. 2001).

[12]*Young v. Bryco, et.al.,* 765 N.E.2d 1 (Ill. App. 2002) (*appeal pending*).

[13]*Hurst v. Glock,* 684 A.2d 970 (N.J. App. 1996).

[14]For example, a gun manufacturer may fail to include a feasible safety device, and as a result of that failure a child may unintentionally shoot another child. It is, of course, entirely foreseeable to the manufacturer that children will have access to guns. Under generally-accepted principles of products liability law, the manufacturer could be liable because the shooting was a foreseeable result of not including the safety device. Similarly, auto manufacturers are liable for injuries that could have been prevented by feasible safety features, even in accidents that involve speeding or other unlawful use of a car. However, under this bill, the gun manufacturer would be immune from suit because the child's possession and use of the gun, although foreseeable to the manufacturer, would be unlawful.

[15]*McGuire and Lemongello v. Will Co.,Inc., et. al,* No. 02-C-2952 (Cir. Ct. Kanawha County, W.Va.) (March 19, 2003).

- Section 924(h) of title 18, U.S. C. provides: "whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both."

- This exception would only allow lawsuits against dealers who are convicted of selling guns knowing that they will be used to commit a violent or drug trafficking criminal offense under federal or state law. In other words, it applies only in the unlikely event that a gun buyer clearly indicates his/her criminal intentions to the gun seller and is also, in fact, convicted of the specific crime[16]. Under this exception, a prosecutor's decision--even if justified--not to pursue a particular prosecution, or to accept a plea bargain to a lesser offense may operate to deny relief to one harmed as a result of a negligent transfer.

- This exception would not preserve the pending case brought by the family of former Northwestern University basketball coach Ricky Byrdsong.[17] Mr. Byrdsong was walking with his children in Skokie, Illinois when he was shot and killed with one of 72 guns sold to an Illinois gun trafficker by a dealer over a period of a year and a half. The dealer clearly should have known that the trafficker did not need 72 guns for his own use, but intended to sell them to criminals. Since the dealer did not know specifically to whom the trafficker would sell, or what specific crimes his customers would commit, Mrs. Byrdsong's case would not fall within this exception.

2. NEGLIGENT ENTRUSTMENT AND NEGLIGENCE PER SE

The bill also includes an exception for actions against gun sellers under the legal doctrines of negligent entrustment and negligence per se. This exception does not preserve any cases against gun manufacturers, and only protects a limited class of cases against sellers.

(a) Negligent Entrustment

- Negligent entrustment is defined in the bill as: "the supplying of a qualified product by a seller for use by another person when the seller knows, or should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person and others."

- This exception would cover only cases where the dealer knows or should know that the person who is buying the gun is likely to misuse it and the buyer does, in fact, misuse it.

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[16]Mr. Scott was prepared to offer an amendment which would have eliminated this unprecedented "criminal conviction predicate," requiring prosecution and conviction as a condition for bringing suit for civil relief.

[17]*Anderson v. Bryco, et al.*, No. 00 L 7476 (Cir. Court of Cook County, Ill.).

Like the previous exception, this would still shut the courthouse door to victims of the far more common practice of dealers negligently selling guns to traffickers who, in turn, supply criminals.

- Under this exception, not only would the previously-mentioned Byrdsong case be barred, but the bill would deny relief to Minority witness, former New Jersey police officer Lemongello and his partner, who were shot with a handgun sold as part of a 12-handgun sale by a West Virginia dealer to a "straw buyer" for a gun trafficker.[18] Even though the dealer who irresponsibly supplied the gun trafficker with multiple guns should have known the guns would be sold to and used by criminals, they arguably did not "negligently entrust" the guns since the persons to whom they sold the guns were not the shooters.

- Because negligent entrustment is not even recognized in every state, in some states this "exception" would have absolutely no effect in preserving claims of those harmed by the foreseeable conduct of those to whom guns are negligently sold.[19]

(b) Negligence Per Se

- Negligence per se is "the unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of the reasonable man."[20] To be liable for negligence per se, a defendant must have violated a law or regulation *and* the plaintiff must be in the class of victims that the legislation intended to protect *and* the court must conclude that it is "appropriate" to deem violation of the particular statute as per se proof of negligence.

- Under this exception, gun sellers whose negligence causes injury could not be liable unless, at a minimum, they also violated a law or regulation that the court found an "appropriate basis" for a negligence per se claim. This exception would not preserve the Illinois case discussed above, *Anderson v. Bryco*, because even though the dealer was convicted of violating gun laws in his sale of some guns to the trafficker, he was not convicted of illegally selling the gun used to shoot Ricky Byrdsong. The West Virginia *Lemongello* case would not be protected by the exception because the doctrine of negligence per se is not recognized in West Virginia.[21] Similarly, since negligence per se

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[18] *McGuire and Lemongello v. Will Co., Inc.,* No. 02-C-2952, (Cir. Court, Kanawha County, W.Va.)

[19] *E.g., Regan v. Nissan North America, Inc.,* 810 A.2d 255 (R.I. 2002) (Rhode Island does not recognize negligent entrustment theory).

[20] *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998). Texas's definition of "negligence per se" is similar to that employed by other states.

[21] *Gillingham v. Stephenson*, 551 S.E.2d 633 (W.Va. 2001). Negligence per se also is not an accepted basis for liability in a number of other states, including Arkansas, North Dakota and Maine. *E.g., Berkeley Pump*

also is not recognized in Washington State[22] this exception would not apply to the case brought in that state by victims of last Fall's sniper shootings against the gun shop from which the Bushmaster assault rifle used in the shootings mysteriously "disappeared."[23] Moreover, it is not yet clear that a statutory violation was involved in the "disappearance" of the Bushmaster assault rifle used to shoot sixteen people. It may have been a case of negligent store security or storage practices.

3. KNOWING AND WILLFUL VIOLATIONS OF LAW

The bill also exempts cases against gun sellers and manufacturers "in which a manufacturer or seller of a qualified product knowingly and willfully violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought."

- This exception is an even more limited version of negligence per se. The exemption does not protect cases against negligent gun sellers or manufacturers unless they also violate a law *and* the case is brought in a state that applies the doctrine of negligence per se.

- Further, under this exception, even sellers who violate laws would not be liable unless that violation was committed "knowingly and willfully." This is a demanding standard of proof that is difficult to meet, and that is generally not required to be met in civil cases.

4. BREACH OF CONTRACT OR WARRANTY

The bill has an exception for "an action for breach of contract or warranty in connection with the purchase of the product."

- Breach of contract cases occur when one party to a contract claims the other party has violated a provision of a contract. This would merely allow gun purchasers to sue a dealer if, for example, the dealer did not provide the gun for which the purchaser paid, or the dealer violated the sales contract in some other respect.

- A warranty case would challenge a manufacturer's refusal to repair or replace a product as it promised under its warranty. This would merely allow a gun purchaser to sue if, for example, the gun malfunctioned within the warranty period and the manufacturer refused to repair or replace it.

Co. v. Reed-Joseph Land Co., 653 S.W.2d 128 (Ark. 1983); *Brandt v. Milbrath*, 647 N.W.2d 674 (N.D. 2002); *Crowe v. Shaw*, 755 A.2d 509 (Me. 2000).

[22] *See* Wash. Rev. Code Ann. § 5.40.050 (1986), abrogating negligence per se.

[23] *Johnson v. Bull's Eye Shooter Supply*, No. 03-2-03932-8 (Sup.Ct.Wa.).

- This exception would only protect gun purchasers, and would provide no remedies for other persons injured by guns. Other victims of defectively designed or negligently sold guns would not be allowed to pursue their rights in court under this exception. Even as to gun purchasers, their claims would be limited only to what they were entitled under the scope of the contract or warranty.[24]

5. DEFECTIVE DESIGN OR MANUFACTURE WHERE GUN USED AS INTENDED

The bill protects actions "for physical injuries or property damage resulting directly from defect in design or manufacture of the product, when used as intended." (Sec. 4(5)(v)).

- This exception allows cases where, for example, a gun exploded when it was being fired, as a result of faulty manufacture or design. In such a case, the gun was "used as [the manufacturer] intended," but nevertheless malfunctioned. However, the exception would not apply to most defective design cases actually brought under traditional products liability theories. In most such cases the use of the gun, while clearly foreseeable to the manufacturer, was not "as intended." This provision alters generally-accepted principles of products liability law under which a manufacturer must implement feasible safety features that would prevent injury caused by foreseeable use or misuse – even if that use is not "intended." For example, auto makers are liable for not making cars "crashworthy," regardless of whether a particular accident may have involved a use of the car – excessive speed or other driver error – not "intended" by the manufacturer.

- Under this exception the parents of Kenzo Dix, whose son was unintentionally shot and killed by a young friend who thought the gun was unloaded, would be barred from pursuing their case against the gun manufacturer.[25] Even though the manufacturer's failure to include a feasible safety device would have alerted Kenzo's friend that the gun was loaded, and would have prevented him from firing the gun – and the friend's "misuse" was common and predictable – the gun was not "used as intended." Ironically, however, similar cases involving "unintended" uses, with less tragic consequences, would be allowed against BB gun makers.

E. H.R. 1036 Raises Constitutional And Federalism Concerns

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[24]For example, if the manufacturer failed to include a feasible safety device in the gun, and that failure caused a death or injury, this exception would not apply to a suit by the victim because he/she would be suing under negligence or products liability law, but would not be claiming a breach of contract or warranty. The negligent sales cases discussed above would also be protected by this exception, as they are based in negligence, not contract or warranty.

[25] *Dix v. Beretta U.S.A.*, No. 750681-9 (Sup. Court of Alameda County, CA).

Among the many problems with the legislation, we are also concerned that the bill may be unconstitutional under the Commerce Clause, the Fifth Amendment, and the Seventh Amendment.

First, the bill as drafted invites legal challenges to Congressional authority to legislate in this area, given the Supreme Court's recent Commerce Clause jurisprudence. There is a genuine issue as to whether H.R. 1036 is a permissible exercise of Congress' power to regulate interstate commerce,[26] given that it contains no interstate commerce jurisdictional requirement, and merely makes a flat and unsubstantiated assertion that all of the activities it regulates affect interstate commerce.[27] The Supreme Court repeatedly has frowned upon federal intervention into areas like liability law that have been traditionally reserved to the states.[28]

The bill also invites challenges that it violates the Fifth Amendment, which provides that no person shall be "deprived of life, liberty, or property without due process of law,"[29] a proscription which has been held to include an equal protection component.[30] Plaintiffs will no doubt argue that the law does not provide a legislative *quid pro quo* and, as such, violates the Fifth Amendment. In exchange for depriving plaintiffs of their common law rights, the bill does not provide any offsetting legal benefits, at least to the parties directly harmed by the loss of their common law rights.

Also, by applying to pending lawsuits, the bill invites the constitutional challenge that the bill constitutes an unlawful taking in violation of the Fifth Amendment. This Committee considers various liability proposals, and it is highly unusual to impact pending lawsuits.

Finally, the bill may violate the Seventh Amendment, which provides, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the

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[26]Article I, Section 8 of the Constitution provides, *inter alia,* "Congress shall have Power ... to regulate Commerce with foreign Nations and among the several States ... ." U.S. Const. art I, § 8, cl. 3.

[27]According to the Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995), one of the problems with the school gun ban was that it contained "no express jurisdictional element which might limit its reach to a discrete set of firearms possessions that additionally have an explicit connection with or effect on interstate commerce."

[28]The Court in *Lopez* observed that there were certain traditional areas of state law, such as criminal law and education, which should be off limits to federal intervention. The concurrence by Justices Kennedy and O'Connor also reasoned that the federal government should avoid involving itself in areas which fall within the "traditional concern of the states," noting that over 40 States had adopted laws outlawing the possession of firearms on or near school grounds.

[29]U.S. Const. amend. V.

[30]*See Bolling v. Sharpe*, 347 U.S. 497 (1954) (Fifth Amendment due process found to incorporate equal protection guarantees in case involving public school desegregation by the Federal Government in the District of Columbia).

United States, than according to the rules of the common law."[31] Because the bill eliminates the right of a jury to determine liability issues, the legislation arguably deprives a plaintiff of the right to jury.

Conclusion

Supporters of H.R. 1036, the gun lobby-backed immunity bill that would shield irresponsible gun manufacturers, sellers, dealers, distributors and importers from liability, claim that the lawsuits prohibited by the bill are "frivolous," "unprecedented,"and have been universally rejected by the courts. To the contrary, courts around the country have recognized that precisely the types of cases that would be barred by this bill are grounded in well-accepted legal principles, including negligence, products liability, and public nuisance. These courts have held that those who make and sell guns – like all others in society – are obligated to use reasonable care in selling and designing their product, and that they may be liable for the foreseeable injurious consequences of their failure to do so even if those foreseeable consequences include unlawful conduct by third parties. This bill, if enacted, would nullify these decisions, rewriting and subverting the common law of those states, and then, only with respect to a particular industry.

To be certain, a few states have held – at least with respect to manufacturers – in a manner consistent with the thrust of this bill. The diversity of these state court decisions, however, is not a sign of a national problem in need of a fix. It is, instead, the essence of federalism. It is not the business of Congress cavalierly to undermine the authority of the states to make and interpret their own laws or to eviscerate the vested rights and interests of the citizens therein. It is not a responsible Congress that does so through the spectacle of a mock hearing and truncated markup in which voices of dissent were suppressed.

John Conyers, Jr.
Howard Berman
Jerrold Nadler
Robert C. Scott
Melvin L. Watt
Zoe Lofgren
Sheila Jackson Lee
Maxine Waters
Martin T. Meehan
William D. Delahunt
Robert Wexler
Tammy Baldwin
Anthony D. Weiner
Linda T. Sanchez

[31]U.S. Const. amend. VII.